

# Exhibit “3”

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**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

**FEB 18 2010**

Attorneys for Defendants and Cross-Complainants  
Jason S. Schermerhorn and Jennifer M. Schermerhorn

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF RIVERSIDE**

GMAC MORTGAGE, LLC, fka GMAC  
MORTGAGE CORPORATION, AND  
EXECUTIVE TRUSTEE SERVICES, LLC, fka  
EXECUTIVE TRUSTEE SERVICES, INC.,

Plaintiff,

v.

MARK TOZIER, an individual; JASON S.  
SCHERMERHORN, an individual; JENNIFER  
M. SCHERMERHORN, an individual;  
CALIFORNIA EMPIRE FINANCIAL GROUP,  
INC., a California corporation; FIDELITY  
NATIONAL TITLE COMPANY, a corporation;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., a corporation; BANK OF  
AMERICA, N.A.; PRLAP, INC., a corporation;  
REGIONAL SERVICE CORPORATION, a  
corporation; REGIONAL TRUSTEE SERVICE  
CORPORATION; a corporation; NATIONAL  
BANK OF KANSAS CITY, a corporation;  
LSI TITLE AGENCY, INC., a corporation;  
CAL-WESTERN RECONVEYANCE  
CORPORATION, a corporation; FIRST  
AMERICAN TITLE COMPANY, a  
corporation; WELLS FARGO BANK, N.A.;  
AND ALL CLAIMING ANY LEGAL OR  
EQUITABLE RIGHT, TITLE, ESTATE, LIEN,  
OR INTEREST IN THE PROPERTY  
DESCRIBED IN THE COMPLAINT  
ADVERSE TO PLAINTIFFS' DEED OF  
TRUST, OR ANY CLOUD ON THE 1ST  
PRIORITY POSITION DEED OF TRUST; and  
DOES 1 through 25, inclusive,

Defendants.

Case No. RIC541193

CROSS-COMPLAINT OF JASON S.  
SCHERMERHORN AND JENNIFER M.  
SCHERMERHORN FOR:  
(1) DECLARATORY RELIEF; (2) QUIET  
TITLE; (3) CANCELLATION OF  
INSTRUMENTS; (4) REFORMATION OF  
FULL RECONVEYANCE; (5) INDEMNITY  
AND CONTRIBUTION; AND (6) BREACH  
OF CONTRACT

Judge: Hon. Gloria Connor Trask  
Dept.: 1

Complaint Filed: December 1, 2009  
Trial Date: None

**EXHIBIT 3 TO OPPOSITION - Cross-Complaint**

CROSS-COMPLAINT OF JASON S. SCHERMERHORN AND JENNIFER M. SCHERMERHORN

1  
2 JASON S. SCHERMERHORN, an individual; )  
3 and JENNIFER M. SCHERMERHORN, an )  
4 individual; )  
5 Cross-Complainants, )  
6 v. )  
7 GMAC MORTGAGE, LLC, fka GMAC )  
8 MORTGAGE CORPORATION, a Delaware )  
9 limited liability company; EXECUTIVE )  
10 TRUSTEE SERVICES, LLC, fka EXECUTIVE )  
11 TRUSTEE SERVICES, INC., a Pennsylvania )  
12 limited liability company; MORTGAGE )  
13 ELECTRONIC REGISTRATION SYSTEMS, )  
14 INC., a corporation; BANK OF AMERICA, )  
15 N.A.; and ROES 1-25, inclusive, )  
16 Cross- Defendants. )  
17

18 Cross-Complainants Jason S. Schermerhorn and Jennifer M. Schermerhorn (hereinafter the  
19 "Schermerhorns" or "cross-complainants"), by and through their attorneys, hereby allege as follows:

20 **FACTS COMMON TO ALL CLAIMS**

- 21 1. Cross-complainant Jason S. Schermerhorn is an individual with his usual residence in  
22 the City of Temecula, County of Riverside, in the State of California.
- 23 2. Cross-complainant Jennifer M. Schermerhorn is an individual with her usual residence  
24 in the City of Temecula, County of Riverside, in the State of California.
- 25 3. The Schermerhorns are informed and believe and thereon allege, based upon the  
26 allegations contained in the underlying complaint in this matter, that cross-defendant GMAC  
27 Mortgage, LLC, fka GMAC Mortgage Corporation ("GMAC") is, and at all times herein mentioned,  
28 was a limited liability company, duly organized, and existing under the laws of the State of Delaware  
with its principal place of business in Horsham, Pennsylvania, and is a mortgage loan lender and/or  
servicer and is or was an authorized agent and lender/servicer for Mortgage Electronic Registration  
Systems, Inc. ("MERS"), nominal beneficiary under the Deed of Trust dated March 30, 2005, and  
recorded April 4, 2005, as Instrument No. 2005-0261680 in the Office of the Riverside County  
Recorder. (Exhibit "2" to GMAC's complaint in this case.)

**EXHIBIT 3 TO OPPOSITION - Cross-Complaint**

1           4.       The Schermerhorns are informed and believe and thereon allege, based upon the  
2 allegations contained in the underlying complaint in this matter, that cross-defendant Executive  
3 Trustee Services, LLC, formerly known as Executive Trustee Services, Inc., is, and at all times herein  
4 mentioned, was a limited liability company, duly organized, and existing under the laws of the State  
5 of Pennsylvania with its principal place of business in Horsham, Pennsylvania, and is the Substituted  
6 Trustee under the Deed of Trust dated March 30, 2005, and recorded April 4, 2005, as Instrument  
7 No. 2005-0261681 in the Office of the Riverside County Recorder. (Exhibit "2" to GMAC's  
8 complaint in this case.)

9           5.       The Schermerhorns are informed and believe and thereon allege, based upon the  
10 allegations contained in the underlying complaint in this matter, that cross-defendant MERS is a  
11 corporation organized and existing under the laws of Delaware and that, for all times pertinent hereto,  
12 MERS is and was, upon information and belief, doing business within the State of California.

13           6.       The Schermerhorns are informed and believe and thereon allege, based upon the  
14 allegations contained in the underlying complaint in this matter, that cross-defendant Bank of  
15 America is a national association and, upon information and belief, is licensed to do business and  
16 doing business in the State of California and in Riverside County, California.

17           7.       The Schermerhorns are ignorant of the true names and capacities of cross-defendants  
18 sued herein as Roes 1 through 25 and therefore sues these cross-defendants by such fictitious names.  
19 The Schermerhorns will amend this cross-complaint to allege the true names and capacities when  
20 ascertained. The Schermerhorns are informed and believe and thereon allege that each of these  
21 fictitiously named cross-defendants claims some right, title, estate, lien or interest in the property  
22 which is the subject of this action adverse to the Schermerhorns' title and their claims, and each of  
23 them, constitute a cloud on the Schermerhorns' title to that property. The Schermerhorns are also  
24 informed and believe and thereon allege that Plaintiff these fictitiously named cross-defendants are  
25 responsible in some way for the damages suffered by them. Each reference in this cross-complaint to  
26 "cross-defendant" or "cross-defendants," refers also to all cross-defendants sued under fictitious  
27 names.

28 ///

**EXHIBIT 3 TO OPPOSITION - Cross-Complaint**

1           8.       The Schermerhorns are informed and believe and thereon allege that, at all relevant  
2 times, cross-defendants were the agents, employees, representatives, partners and related and/or  
3 affiliated entities or employees of each of the other remaining cross-defendants, and were acting in  
4 the scope and course of their agency and employment with the consent, authority and ratification of  
5 the other cross-defendants. The Schermerhorns are further informed and believe and thereon allege  
6 that all cross-defendants, and each of them, are responsible in some way for the damages suffered by  
7 the Schermerhorns.

8                                   **SPECIFIC FACTUAL ALLEGATIONS**

9           9.       The Schermerhorns are currently the owners of the real property improved with a  
10 single-family residence commonly known as 33914 Tuscan Creek Way, Temecula, California, 92592,  
11 (hereinafter "the Property") and legally described as follows:

12                               "Lot 1 of Tract No. 30448, in the County of Riverside, State of California, as  
13 per Map recorded in Book 351 at pages 58 to 64, inclusive, of Maps in the Office of the  
County Recorder of said County.

14                               Together wit [sic] any and all easements, rights, benefits, and interests  
15 appurtenant to said lot as created and/or established in the CC&R's recorded March 3, 2004 as  
Instrument No. 2004-0149657, and any amendments thereto, in the official records of said  
County.

16                               Excepting therefrom and reserving to grantor all oil, gas, minerals and other  
17 hydrocarbon substances lying below a depth of 500 feet but without the right of surface entry.

18                               APN # 952-210-009-6."

19           10.       On or about June 10, 2008, Cross-Complainants entered into a contract to purchase the  
20 Property described in paragraph 9 above from cross-defendant Bank of America. The purchase price  
21 paid by the Cross-Complainants for the Property was \$341,000.

22           11.       The Schermorhorns' purchase of the Property from Bank of America closed on  
23 July 11, 2008. A true and correct copy of the Grant Deed recorded on July 11, 2008, as Instrument  
24 No. 2008-0381943 in the Office of the Riverside County Recorder is attached hereto as Exhibit "A."

25           12.       To finance their purchase of the Property, Cross-Complainants obtained a loan from  
26 the National Bank of Kansas City in the original principal amount of \$348,331.00. A true and correct  
27 copy of the Deed of Trust recorded on July 11, 2008, as Instrument No. 2008-0381944 in the Office  
28 of the Riverside County Recorder is attached hereto as Exhibit "B."

**EXHIBIT 3 TO OPPOSITION - Cross-Complaint**

1 13. The Schermerhorns are informed and believe and thereon allege that, prior to  
2 March 21, 2008, Bank of America had a lien on the Property as evidenced by the Short Form Deed of  
3 Trust recorded in the Riverside County recorder's office on November 23, 2005, as Instrument  
4 No. 2005-0976640, a true and correct copy of which is attached to GMAC's complaint in this case as  
5 Exhibit "3."

6 14. The Schermerhorns are informed and believe and thereon allege that the loan by Bank  
7 of America, for which the November 23, 2005 Short Form Deed of Trust recorded in the Riverside  
8 County recorder's office on November 23, 2005, as Instrument No. 2005-0976640 (Exhibit "3" to  
9 GMAC's complaint) was given, was made to pay off the obligation secured by the deed of trust  
10 recorded in the Riverside County recorder's office on April 4, 2005, as Instrument No. 2005-0161681  
11 in favor of GMAC.

12 15. The Schermerhorns are informed and believe and thereon allege that GMAC or its  
13 agent caused two reconveyances to be recorded by written instruments, which were recorded on  
14 November 29, 2005, as Instrument No. 2005-0984449 and on February 29, 2008, as Instrument  
15 No. 2008-0099105, respectively. True and correct copies of these reconveyances are attached hereto  
16 as Exhibits "C" and "D," respectively.

17 16. As a result, the Schermerhorns are informed and believe and thereon allege that Bank  
18 of America's Short Form Deed of Trust (Exhibit "3" to GMAC's complaint) was a second position  
19 lien on the Property commencing in November 2005.

20 17. The Schermerhorns are informed and believe and thereon allege that cross-defendant  
21 Bank of America obtained the Property as a result of a non-judicial foreclosure sale which it  
22 conducted on March 21, 2008, obtaining title to the Property by way of a Trustee's deed recorded in  
23 the office of the Riverside County recorder on April 30, 2008, as Instrument No. 2008-0222317.

24 18. The Schermerhorns are informed and believe and thereon allege that, on or about  
25 June 17, 2008, a date which is approximately three (3) months after Bank of America acquired title to  
26 the Property, cross-defendant GMAC, by itself and/or through its agents cross-defendant Executive  
27 Trustee Services, Inc. and cross-defendant MERS, attempted to rescind and set aside the  
28 reconveyance of the deed of trust which is Instrument No. 2005-0261681, which cross-defendant

**EXHIBIT 3 TO OPPOSITION - Cross-Complaint**

1 GMAC or its agent had caused to be reconveyed by instrument recorded on November 29, 2005, as  
2 Instrument No. 2005-0984449. A true and correct copy of this Rescission is attached hereto as  
3 Exhibit "E."

4 19. The Schermerhorns are further informed and believe and thereon allege that Bank of  
5 America knew of GMAC's assertion that its deed of trust recorded on April 4, 2005, as Instrument  
6 No. 2005-0261680 had been improperly reconveyed as a result of the attempted Rescission  
7 (Exhibit "E"). However, Bank of America never disclosed that assertion to the Schermerhorns in  
8 connection with their purchase of the Property from Bank of America.

9 20. The Schermerhorns are informed and believe and thereon allege that Bank of  
10 America's acquisition of the Property was not subject to the two deeds of trust recorded in the  
11 Riverside County recorder's office on April 4, 2005, as Instrument Nos. 2005-0261681 and 2005-  
12 0161681, respectively, because those two deeds of trust had been reconveyed by instruments recorded  
13 on November 29, 2005, as Instrument No. 2005-0984449 and on February 29, 2008, as Instrument  
14 No. 2008-0099105, respectively ( Exhibits "C" and "D," respectively)

15 21. The Schermerhorns are informed and believe and thereon allege that the  
16 Reconveyance (Exhibit "C"), is a written instrument which does not appear, on its face, and without  
17 any indication to the contrary, to have been signed and/or recorded in error or by mistake.

18 22. At no time prior to the Schermerhorns' agreement to purchase the Property, were the  
19 Schermhorns ever given notice by anyone, including, without limitation, cross-defendants herein, that  
20 cross-defendant GMAC was attempting to claim a lien on the Property senior to that of the  
21 Schermerhorns' predecessor, Bank of America.

22 23. Had the Schermerhorns known of any attempt by or on behalf of cross-defendant  
23 GMAC to assert a lien on the Property in the approximate amount of \$429,856 that was alleged to be  
24 senior to that of the Schermerhorns' predecessor, Bank of America, the Schermerhorns would not  
25 have agreed to purchase the Property.

26 24. The Schermerhorns are informed and believe and thereon allege that the attempted  
27 rescission (Exhibit "E") is ineffective as a matter of fact and of law and, as such, should be cancelled  
28 and set aside.

1 **FIRST CAUSE OF ACTION**

2 ***(Cancellation of Instruments)***

3 (California Civil Code § 3412)

4 25. The Schermerhorns reallege and incorporate Paragraphs 1 through 24, inclusive, as  
5 though set forth in full here.

6 26. As set forth here, the Schermerhorns are informed and believe and thereon allege that  
7 the attempted Rescission (Exhibit "E") is ineffective as a matter of fact and of law and, as such, is  
8 void or voidable as to the Schermerhorns, and, therefore, should be cancelled and set aside.

9 27. In addition, the Schermerhorns are informed and believe and thereon allege that, for  
10 the reasons set forth above, there was a material lack or failure of consideration for the recording of  
11 the Rescission (Exhibit "E") and that, as a consequence, the execution, delivery and recordation of the  
12 Rescission may constitute a fraudulent conveyance.

13 28. As set forth here, the Schermerhorns are informed and believe and thereon allege that,  
14 if the Rescission is allowed to stand, they will be seriously injured, damaged, and prejudiced, in that  
15 the Schermerhorns' interest in the Property will thereafter be subject to a lien in excess of \$400,000 of  
16 which they had no notice, and which was properly reconveyed prior to the non-judicial foreclosure  
17 sale described above in Paragraph 17.

18 29. As a result, the Schermerhorns are informed and believe, and thereon allege, that the  
19 Rescission should be canceled.

20 **SECOND CAUSE OF ACTION**

21 ***(Rescission - Material Failure or Lack of Consideration)***

22 (California Civil Code § 1689(b))

23 30. The Schermerhorns reallege and incorporate Paragraphs 1 through 29, inclusive, as  
24 though set forth in full here.

25 31. The Schermerhorns are informed and believe, and thereon allege, that the Rescission  
26 should be rescinded, for the reasons set forth above, namely: that it is not supported by good, valuable  
27 or sufficient consideration, and the cross-defendants, or any of them, had no right or authority to  
28 cause it to be recorded.



1 32. These and other reasons constitute a material lack of or failure of consideration, and  
2 therefore constitute grounds for rescission under California Civil Code § 1689.

3 **THIRD CAUSE OF ACTION**

4 ***(Quiet Title)***

5 33. The Schermerhorns reallege and incorporate Paragraphs 1 through 32, inclusive, as  
6 though set forth in full here.

7 34. The Schermerhorns are currently the owners of the Property, as set forth above.

8 35. The Schermerhorns are informed and believe and thereon allege that cross-defendants,  
9 or some of them, claim an interest adverse to the Schermerhorns in or to the above-described Property  
10 as holder or holders of liens against the Property, which cross-defendants alleges are now purportedly  
11 superior to that of the interest of the Schermerhorns, and which lien had previously been reconveyed.

12 36. The Schermerhorns are seeking to quiet the title to the Property, as follows: that the  
13 deed of trust recorded in the Riverside County recorder's office on April 4, 2005, as Instrument  
14 No. 2005-0261681, which was reconveyed by instruments recorded on November 29, 2005, as  
15 Instrument No. 2005-0984449 (Exhibit "C"), does not constitute a valid lien against the Property.

16 37. The Schermerhorns further seek to quiet title as follows: that the Rescission  
17 (Exhibit "E") is invalid and void and is of no effect as to the Property.

18 38. The Schermerhorns are seeking to quiet the title to the Property as of time of trial.

19 **FOURTH CAUSE OF ACTION**

20 ***(Declaratory Relief)***

21 39. The Schermerhorns reallege and incorporate Paragraphs 1 through 38, inclusive, as  
22 though set forth in full here.

23 40. The Schermerhorns are informed and believe and thereon allege that an actual  
24 controversy has arisen and now exists between them, on the one hand, and cross-defendants, on the  
25 other hand.

26 41. Specifically, the Schermerhorns are informed and believe and thereon allege that cross-  
27 defendants and each of them claim some right, title, estate, lien, or interest in or to the Property that is  
28 adverse to or senior to the Schermerhorns' interest, or which interest damages or prejudices the

**EXHIBIT 3 TO OPPOSITION - Cross-Complaint**

1 Schermerhorns' interest in and to the Property. The Schermerhorns deny that cross-defendants, or  
2 any of them, hold any interest in or to the Property.

3 42. The Schermerhorns are informed and believe and thereon allege that the Rescission  
4 constitutes a cloud on their title and interest in the Property as the record owners of the Property and,  
5 as a result, should be removed from the public record.

6 43. The Schermerhorns are informed and believe and thereon allege that cross-defendants  
7 dispute the Schermerhorns' contentions. As a result, a judicial determination is needed as to the  
8 respective rights of the parties in and to the Property.

9 **FIFTH CAUSE OF ACTION**

10 ***(Indemnity and Contribution)***

11 44. The Schermerhorns reallege and incorporate Paragraphs 1 through 43, inclusive, as  
12 though set forth in full here.

13 45. Concurrently with this cross-complaint the Schermerhorns are filing and serving an  
14 answer to the complaint of cross-defendant GMAC which seeks, inter alia, a finding that the  
15 Rescission (Exhibit "E" hereto) has the effect of cancelling the Reconveyance of the deed of trust  
16 recorded in the Riverside County recorder's office on April 4, 2005, as Instrument No. 2005-  
17 0261681, which Reconveyance was recorded on November 29, 2005, as Instrument No. 2005-  
18 0984449 (Exhibit "C").

19 46. In that answer, the Schermerhorns deny that cross-defendant GMAC is entitled to the  
20 relief it has requested vis-a-vis the Schermerhorns.

21 47. However, the Schermerhorns are informed and believe and thereon allege that if cross-  
22 defendants GMAC prevails in any way, then any damages sustained by the cross-defendant and  
23 Plaintiff GMAC were caused, entirely or in part, by cross-defendants, or any of them, including cross-  
24 defendant GMAC itself.

25 48. Specifically, the Schermerhorns are informed and believe and thereon allege as  
26 follows:

- 27 a. That any damage to GMAC was actually and proximately caused by its own  
28 negligence and failure to mitigate, and/or by the acts of any or all of the other cross-

**EXHIBIT 3 TO OPPOSITION - Cross-Complaint**

1 defendants and that, by their conduct, any recovery to which cross-defendant GMAC  
2 may otherwise be entitled should be reduced by the amount of fault attributable to  
3 GMAC.

- 4 b. Cross-defendants, including GMAC, are estopped by reason of their own conduct, acts,  
5 and/or omissions, and are hence barred from any recovery on any claims that they may  
6 have against the Schermerhorns, and that any recovery in favor of GMAC should only  
7 be ordered against those cross-defendants at fault.
- 8 c. Pre-existing knowledge by cross-defendants, including GMAC, of the true facts,  
9 including the conduct by Bank of America of the non-judicial foreclosure sale, defeats  
10 cross-defendants' ability to allege a claim and/or damages as against the  
11 Schermerhorns
- 12 d. Cross-defendants, including GMAC, had the sole ability to correct any mistakes, if in  
13 fact there were any mistakes, before the Schermerhorns relied on the state of title to the  
14 Property, and their failure to act timely and reasonably bars any recovery on their part.
- 15 e. That any damage to cross-defendants, including GMAC, or to any of them, was the  
16 result of the failure of one or more of the cross-defendants to exercise reasonable and  
17 ordinary care, caution or prudence with regard to their rights, and thus failed to avoid  
18 the alleged damages claimed by Plaintiffs. The resulting damages, if any, sustained by  
19 Plaintiffs (which the defendants deny) were proximately caused and contributed to by  
20 the negligence of Plaintiffs, their employees, agents, contractors, representatives,  
21 predecessor in interest, or other persons unknown to the Defendants, and the  
22 Schermerhorns are entitled to be indemnified by those cross-defendants so responsible  
23 for any damage which GMAC may be determined to have sustained.

24 49. As between the Schermerhorns, on the one hand, and cross-defendants, responsibility,  
25 if any, for the damages claimed by plaintiff GMAC rests entirely or partially on cross-defendants, not  
26 on the Schermerhorns. As a result, cross-defendants are obligated to fully, or partially, indemnify the  
27 Schermerhorns, and/or to provide contribution for any sums that the Schermerhorns may be

28 ///

1 compelled to pay as the result of any damages, judgment or other awards recovered by the plaintiff  
2 GMAC against the Schermerhorns.

3 50. The Schermerhorns desire a judicial determination of the duties of cross-defendants to  
4 indemnify them with respect to the damages claimed in the plaintiff's complaint and the fees and costs  
5 incurred by the Schermerhorns in appearing and defending themselves. In particular,  
6 Cross-complainants desire a determination of their comparative liability and of the cross-defendants  
7 for these damages, and a declaration of cross-defendants' responsibility for comparative full or partial  
8 indemnity and/or contribution to the Schermerhorns for any sums that the Schermerhorns may be  
9 compelled to pay and for which cross-defendants are determined responsible entirely or in part.

10 **SIXTH CAUSE OF ACTION**

11 ***(Breach of Contract/Warrantis and Representations)***

12 **(Against Cross-defendant Bank of America Only)**

13 51. The Schermerhorns reallege and incorporate Paragraphs 1 through 50, inclusive, as  
14 though set forth in full here.

15 52. Among the material representations and warranties which cross-defendant Bank of  
16 America made to the Schermerhorns in connection with the Agreement, were certain representations  
17 and warranties regarding the state of title to the Property.

18 53. Specifically, and among other things, the Residential Purchase Agreement and joint  
19 Escrow Instructions of the parties, dated as of June 4, 2008, a true and correct copy of which is  
20 attached hereto as Exhibit "F," provides as follows:

21 12. TITLE AND VESTING:

- 22 A. Within the time specified in paragraph 14, Buyer shall be provided a current  
23 preliminary (title) report, which is only an offer by the title insurer to issue a  
24 policy of title insurance and may not contain every item affecting title. Buyer's  
25 review of the preliminary report and any other matters which may affect title  
26 are a contingency of this Agreement.  
27 B. Title is taken in its present condition subject to all encumbrances, easements,  
28 covenants, conditions, restrictions, rights and other matters, whether of record  
or not, as of the date of Acceptance except: (i) monetary liens of record unless  
Buyer is assuming those obligations or taking the property subject to those  
obligations; and (ii) those matters which Seller has agreed to remove in  
writing.  
C. Within the time specified in paragraph 14A, Seller has a duty to disclose to  
Buyer all matters known to Seller affecting title, whether of record or not.

- 1 D. At Close Of Escrow, Buyer shall receive a grant deed conveying title (or, for  
2 stock cooperative or long-term lease, an assignment certificate or of Seller's  
3 leasehold interest), including oil, mineral and water rights if currently owner by  
4 Seller. Title shall vest as designated in Buyer's supplemental escrow  
5 instructions. THE MANNER OF TAKING TITLE MAY HAVE  
6 SIGNIFICANT LEGAL AND TAX CONSEQUENCES. CONSULT AN  
7 APPROPRIATE PROFESSIONAL.
- 8 E. Buyer shall receive a CLTA/ALTA Homeowner's Policy of Title Insurance. A  
9 title company, at Buyers request, can provide information about the  
10 availability, desirability, coverage, and cost of various title insurance coverage,  
11 and endorsements. If Buyer desires title coverage other than that required by  
12 this paragraph, Buyer shall instruct Escrow Holder in writing and pay any  
13 increase in cost.

14 ...

- 15 22. ATTORNEY FEES: In any action, proceeding, or arbitration between Buyer and Seller  
16 arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to  
17 reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as  
18 provided in paragraph 17A.

- 19 54. In addition, the Addendum to Real Estate Purchase Contract dated June 9, 2008, a true  
20 and correct copy of which is attached hereto as Exhibit "G," provided, inter alia:

- 21 15. Insurable title

22 I. Seller shall give and Purchaser shall accept such title as Seller's title insurance  
23 company shall be willing to approve and insure in accordance with its standard form of title  
24 policy approved by the governing agency for the state where the Property is located, subject  
25 only to the matters provided for in this contract.

26 ii. Unless otherwise indicated below, Seller shall furnish Purchaser, at its expense,  
27 a fee (owners) title policy, with coverage in the amount of the purchase price.

28 (Purchasers must initial here, if applicable). I/We will obtain a fee title  
policy and/or title exam at my/our expense. DO NOT INITIAL THIS IN A STATE WHERE  
THE SELLER HAS THE RIGHT TO CHOOSE THE TITLE COMPANY. IN SUCH CASE,  
SELLER RETAINS AND RESERVES SAID RIGHT.

iii. In the even purchaser chooses to obtain their own fee (owners) policy and/or  
title exam, they shall order the same within three days of purchaser executing the contract of  
sale, or all objections to title shall be waived.

Purchaser must notify Seller's attorney of any and all title objections at least ten days  
before closing, or all objections to title shall be waived. If Seller cannot cure said objections  
after a good faith effort, or to do so would delay the closing beyond the original or any  
extended closing date, Purchaser agrees to accept a fee (owners) title policy, as stated above,  
at Seller's expense. Regular rates must apply. Seller agrees to pay the premium for a fee  
(owners) title policy only if the policy is issued by Seller's selected title agent.

If a mortgagee policy is required, Purchaser shall be responsible for payment of the full  
premium.

iv. Seller shall not be obligated to remove any exception or to bring any action or  
proceeding or bear any expense in order to convey title to the Property or to make the title  
marketable or insurable, and any attempt by Seller to remove such title exceptions shall not

1 impose an obligation upon Seller to remove those exceptions. Purchaser acknowledges that  
2 Seller's title to the Property may be subject to court approval of a foreclosure or to a  
mortgagor's right of redemption.

3 In the event Seller is not able to (a) make the title insurable or correct any problems or  
4 (b) obtain title insurance from a title insurance company selected by Seller, all as provided  
herein, either party may terminate the Agreement and any Earnest Money shall be returned to  
5 Purchaser and Seller shall have no further obligation or liability to Purchaser hereunder.  
Section 21 below also provides that Seller may extend the date of Closing or terminate the  
6 Agreement if Seller determines, in Seller's sole and absolute discretion, that Seller is unable to  
convey insurable title to the Property.

7 55. The Schermerhorns are informed and believe and thereon allege that cross-defendant  
8 Bank of America represented and warranted to them that the state of title to the Property was that:  
9 (a) Bank of America owned the fee interest to the property, free of any liens or interests (other than  
10 property taxes which might then be due and owing); and (b) no one claimed a lien that was superior  
11 to, or prior to, Bank of America's interest in the Property.

12 56. Cross-defendant Bank of America breached the Agreement when it breached the title  
13 warranties contained in the Agreement by, including but not limited to:

- 14 a. Failing to disclose that, when Cross-defendant Bank of America acquired its deed of  
15 trust encumbering the Property on November 23, 2005 (Exhibit "3" to GMAC's  
16 complaint), which deed of trust secured repayment of a promissory note in the amount  
17 of \$145,000, the GMAC deed of trust (document numbered 2005-0976640) was a duly  
18 recorded and perfected lien on the Property;
- 19 b. Failing to disclose to the Schermerhorns that GMAC attempted to rescind its  
20 reconveyance of one of its 2005 deeds of trust, as provided in Paragraph 12 C of the  
21 Agreement;
- 22 c. Failing to deliver title to the Schermerhorns, as provided in Paragraph 15.i. of the  
23 Addendum.

24 57. Cross-defendant Bank of America made such representations, or failed to disclose the  
25 true facts, with no reasonable ground for doing so, or for failing to do so.

26 58. Cross-defendant Bank of America induced the Schermerhorns to rely on its  
27 representations in order that the purchase of the property embodied in the Agreement would close,  
28 ///

1 and that the Schermerhorns would, and in fact did, execute the necessary documents and did in fact  
2 close the purchase of the Property.

3 59. The Schermerhorns in fact relied on the representations made by cross-defendant Bank  
4 of America, and took the actions described herein, all to the detriment of the Schermerhorns.

5 60. At the time these representations were made, or at the time they failed to disclose the  
6 true facts, the Schermerhorns were ignorant of the falsity of defendants' representations and the true  
7 facts, namely, that GMAC held a duly-recorded and perfected lien securing an obligation in the  
8 original principal amount of \$429,856.00 at the time the Bank of America deed of trust securing an  
9 obligation in the amount of \$145,000 (Exhibit "3" to GMAC's complaint) was recorded, and that  
10 GMAC was again attempting to claim a lien interest in the Property that was senior and prior to the  
11 interest of coss-defendant Bank of America. Had the Schermerhorns known the true facts, the  
12 Schermerhorns would not have taken the action that they did in agreeing to purchase the Property  
13 from cross-defendant Bank of America.

14 61. The Schermerhorns' reliance on cross-defendant's representations and omissions was  
15 justified because defendants were in a position of superior knowledge relative to the subject matter  
16 thereof.

17 62. The misrepresentations of cross-defendant Bank of America was not discovered by the  
18 Schermerhorns until sometime in or about April 2009, when they attempted to refinance their loan on  
19 the Property.

20 63. As a direct and proximate result of the misrepresentations of cross-defendant Bank of  
21 America, as hereinabove alleged, the Schermerhorns have been damaged in an amount which as not  
22 yet been fully ascertained, but which is believed to exceed \$400,000. The Schermerhorns will seek  
23 leave of court and amend this cross-complaint to allege the exact amount of such damages when the  
24 same shall become known to them, or to conform to proof thereof at trial.

25 64. The aforementioned conduct of cross-defendant Bank of America was a misrepresent-  
26 tion or an omission of a material fact known to such cross-defendant, with the intent on the part of  
27 cross-defendant Bank of America of thereby depriving the Schermerhorns of property or other legal  
28 rights, or otherwise causing injury, and was despicable conduct that subjected the Schermerhorns to a

1 cruel and unjust hardship in conscious disregard of their rights, so as to justify an award of exemplary  
2 and punitive damages in such amount as may abide the discretion of the trier of fact.

3 65. The Residential Purchase Agreement and joint Escrow Instructions (Exhibit "F")  
4 hereto) also provides that the Schermerhorns and Bank of America "agree to mediate any dispute or  
5 claim arising between them out of this Agreement . . .," and that "any dispute or claim in Law or  
6 equity arising between them out of this Agreement . . . which is not settled through mediation, shall  
7 be decided by neutral, binding arbitration . . ." (Exhibit "F," ¶17.) As a result, and by this cross-  
8 complaint, the Schermerhorns demand that cross-defendant Bank of America agree to mediate the  
9 claims between and among them, which claims arise out of the Agreement between them  
10 (Exhibit "F").

11 66. The Schermerhorns have been required to retain counsel to enforce their rights under  
12 the Agreement. As a result, and pursuant to Paragraph 22 of the Agreement, cross-defendant Bank of  
13 America is liable for reasonable attorneys' fees and costs incurred by the Schermerhorns in  
14 connection with the enforcement of any of their rights and/or remedies, including, but not limited to  
15 all legal expenses and attorneys' fees and all expenses incurred in so doing, which amount shall be  
16 determined at trial.

17 Wherefore, the Schermerhorns request the following relief:

18 **On the First and Second Causes of Action:**

19 1. For a judgment cancelling and setting aside the Rescission (Exhibit "E");

20 **On the Third Cause of Action:**

21 1. For a declaration that the Schermerhorns' title to the Property is free and clear of any  
22 claims, right, title or interest of cross-defendants, or any of them, including, without limitation, the  
23 deed of trust recorded in the Riverside County recorder's office on April 4, 2005, as Instrument  
24 No. 2005-0261681;

25 2. For damages in a sum to be determined at time of trial according to proof to the extent  
26 that the Schermerhorns have been caused damage and detriment by the uncertainty occasioned to the  
27 subject Property by reason of the cross-defendants' actions and claims;

28 ///



1 **On the Fourth Cause of Action:**

2 1. For a declaration that cross-defendants, and each of them, do not have any right, title,  
3 estate, lien, or interest in or to the Property that is adverse to or senior to the Schermerhorns' interest.

4 2. For a declaration that the Rescission (Exhibit "E") constitutes a cloud on the  
5 Schermerhorns' title and interest in the Property as the record owners of the Property, and that it  
6 should be removed from the Riverside County Recorders records by way of a written instrument.

7 **On the Fifth Cause of Action:**

8 1. For a judicial determination of the comparative fault of the cross-defendants, and each  
9 of them, for the damages claimed by the Plaintiff, if any are found to exist;

10 2. For a determination of the amount that cross-defendants are obligated to indemnify the  
11 Schermerhorns or to contribute, if the Schermerhorns are compelled to pay any sum as the result of  
12 any damages, judgment, or other awards recovered by the Plaintiff against them, which amount is  
13 presently unknown but which will be proven at trial.

14 **On the Sixth Cause of Action:**

15 1. For compensatory damages according to proof, in order to compensate the  
16 Schermerhorns for Bank of America's breach of warranties and misrepresentations, in an amount  
17 which is believed to exceed \$400,000.00, subject to proof at trial;

18 2. That cross-defendant Bank of America agrees to mediate any and all claims between  
19 and among it and the Schermerhorns, which claims arise out of the Agreement between them  
20 (Exhibit "F"), in accordance with the terms of Exhibit "F";

21 3. For interest from the date of the breaches and misrepresentations, according to proof;

22 **On All Causes of Action:**

23 1. For retention of jurisdiction for the judicial appointment of an elisor to execute  
24 whatever documents are necessary to record in the Riverside County Recorder's Office to impart  
25 constructive notice of any action which this Court deems necessary to effectuate its judgment in this  
26 case, in the event that any party who may be ordered to execute such document(s) is not available or  
27 refuses for any reason to execute and record such document(s);

28 2. For reasonable costs of suit incurred herein;

**EXHIBIT 3 TO OPPOSITION - Cross-Complaint**

1 3. For reasonable attorneys' fees, where provided; and

2 4. For such other and further relief as the Court may deem just and proper.

3 DATED: February 17, 2010

PYLE SIMS DUNCAN & STEVENSON,  
A Professional Corporation

4  
5 By: 

Michael Y. MacKinnon

Kathleen A. Cashman-Kramer

Attorneys for Defendants and Cross-Complainants

Jason S. Schermerhorn and Jennifer M. Schermerhorn

# Exhibit “A”

3PC  
DOC # 2008-0381943

07/11/2008 08:00A Fee:30.00

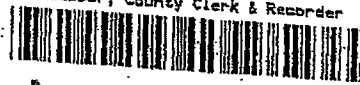
Page 1 of 4 Doc 1 Tax Paid

Recorded in Official Records

County of Riverside

Larry U. Ward

Assessor, County Clerk & Recorder



LSI TITLE, FMS DIVISION

RECORDING REQUESTED BY:

LSI Title Agency

Escrow No.: 08007042MDS

Title Order No.: K836530

WHEN RECORDED MAIL DOCUMENT

AND TAX STATEMENT TO:

Jason Schermerhorn and Jennifer Schermerhorn

33914 Tuscan Creek Way

Temecula, CA 92592

S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
1			4	4					
M	A	L	465	426	FCOR	NCOR	SMF	NCHG	EXAM
					10	94	CTY	(UN)	012

Parcel No.: 966-060-001

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Tra: 013

GRANT DEED

The undersigned grantor(s) declare(s)  
Documentary transfer tax is \$375.10

30

T  
012

- [X] Computed on full value of property conveyed, or  
[ ] Computed on full value less value of liens or encumbrances remaining at time of sale,  
[ ] Unincorporated Area City of Temecula

R & T Code:

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, BANK OF AMERICA hereby GRANT(S) to Jason S. SCHERMERHORN AND JENNIFER M. SCHERMERHORN, HUSBAND AND WIFE, AS COMMUNITY PROPERTY.

the following described real property in the City of Temecula, County of Riverside, State of California:

Legal Description attached hereto and made a part hereof marked exhibit "A"

DATED: June 20, 2008

BANK OF AMERICA NA

BY:

Pamela J. Crocker, Vice President

pamela J. Crocker  
vice president

GRANT DEED